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Supreme Court, U.S.
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No. 95-633

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

- v -

RICO ARNEZ SANDERS,
Respondent.

MOTION TO LEAVE TO PROCEED IN FORMA PAUPERIS
AFFIDAVIT
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
PROOF OF SERVICE

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No. 93 - 633

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

RICO ARNEZ SANDERS
RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, RICO ARNEZ SANDERS, who is now held in the Michigan Reformatory at Ionia, Michigan, asks leave to file the attached Brief, in opposition to the Petition for Writ of Certiorari to the Supreme Court of the State of Michigan without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39.

The Respondent's affidavit in support of this motion is attached hereto. Respondent has been represented by undersigned appointed counsel for all post-conviction proceedings in the Court of Appeals and the Supreme Court of the State of Michigan. See attached Order.

Stuart D. Hubbell

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Traverse City, Michigan
(616) 947-5600

Counsel for Respondent

No. 93 - 633

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

RICO ARNEZ SANDERS
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MICHIGAN COURT OF APPEALS

BRIEF FOR RESPONDENT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

ARE THERE COMPELLING REASONS TO GRANT CERTIORARI OR IS AN IMPORTANT FEDERAL QUESTION PRESENTED IN THIS MATTER WHERE THE MICHIGAN COURT OF APPEALS, IN AN UNPUBLISHED OPINION HAVING NO PRECEDENTIAL VALUE, WHILE RELYING ON THE SIXTH AMENDMENT RIGHT TO COUNSEL, NEVERTHELESS BASED ITS DECISION UPON MICHIGAN COMMON LAW AND MICHIGAN CONSTITUTIONAL PROVISIONS IN GRANTING A NEW TRIAL?

II.

SHOULD THIS COURT DENY CERTIORARI WHERE THE MICHIGAN COURT OF APPEALS GRANTED A NEW TRIAL HAVING DETERMINED THAT, AFTER THE ACCUSED HAD BEEN ARRAIGNED, HIS COUNSEL HAD BEEN APPOINTED AND A PRELIMINARY EXAMINATION HAD BEEN CONDUCTED, THE POLICE INITIATED INTERROGATION OF THE ACCUSED OUTSIDE THE PRESENCE OF ACCUSED'S COUNSEL AND OBTAINED A CONFESSION FROM HIM IN VIOLATION OF MICHIGAN COMMON LAW AND CONSTITUTIONAL PROVISIONS AS WELL AS SIXTH AMENDMENT RIGHT TO COUNSEL PROTECTIONS?

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CONSTITUTIONAL PROVISIONS INVOKED

The **Sixth Amendment** to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Article 1, Section20 of the Michigan Constitution of 1963 provides: "In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his defense . . . "

COUNTERSTATEMENT OF THE CASE

After Respondent Sander's arrest on March 27, 1991, he was arraigned in a Michigan District Court where counsel was appointed pursuant to his request. Subsequent to a preliminary examination held in that court on April 4, 1991, Respondent was bound over for trial in the Michigan Circuit Court.

On April 10, 1991, Respondent's trial counsel wrote the prosecuting attorney advising him that "my client maintains that he is not the shooter and has requested that he be given a polygraph examination." In response, the prosecutor wrote in response, "I received your letter in which you requested on behalf of your client that he take a polygraph on the issue of whether he shot the victims in the case. I will make arrangements to schedule your client for a polygraph at the Michigan State Police Polygraph Examiners Office. As soon as I receive a notification from them of the soonest possible date and time, I will notify you."

Notwithstanding these express representations by the prosecutor to him, defense counsel testified that he was never notified of the date, time or place of the polygraph examination arranged by the prosecutor nor of the fact that that examination was, in fact, taking place. [Ginther Hearing, p 9] Instead, shortly after the Preliminary Examination, unbeknownst to his counsel, Mr. Sanders was taken from jail to the Michigan State Police station for the polygraph examination. He was unaccompanied by counsel. At the conclusion of that examination, Respondent was interrogated by State Police officers Myatt and Hudson in

the absence of his counsel and allegedly made inculpatory admissions to the officers.

Respondent's trial counsel testified that, had he known the examination was going to occur, he would have advised his client never to talk with any polygraph examiner after the examination because, as counsel testified, he understood that a polygraph examiner invariably seeks to obtain a post examination confession as part of the process. "I mean, he [the examiner] is never going to let that chance go by without getting a statement from a defendant if he can. At least that is my conception of the State Police Polygraph." [Ginther Hearing, p 10]

Both officers testified at a pre-trial evidentiary hearing conducted to determine whether Respondent's statements to the officers should be suppressed. The polygraph examiner, Sgt. Myatt, stated under oath:

> Q. And were you aware he had an attorney, Mr. Sanders?
>
> A. Yes, I was.
>
> Q. Okay. Did you have any waiver from his attorney for him to be here?
>
> A. From ... no, not from his attorney. No, I did not.
>
> Q. Okay. How did you tell Mr. Sanders that he - - you thought he had failed the polygraph and was lying?
>
> * * *
>
> A. I told Mr. Sanders after the instrument portion, that in my opinion, he was not being truthful.

[Walker Hearing, p 36]

Thereupon, according to the witness, Sgt. Myatt interrogated Mr. Sanders and obtained inculpatory admissions from him.

At the same hearing, Detective Hudson testified that he

[Det. Hudson] initiated the second interrogation of Mr. Sanders. Detective Hudson stated under oath:

> Q. When would you have asked the questions of Mr. Sanders?
>
> A. I ask questions after the polygraph examination was completed and after Mr. Myatt had done his post interview.
>
> * * *
>
> Officer Myatt approached me and indicated that I might want to speak with Mr. Sanders about this, that he has something he probably wanted to say to me, so . . .

[Walker Hearing, p 43]

On cross-examination, Detective Hudson admitted he initiated the conversation with Mr. Sanders after Sergeant Myatt told him that Respondent probably wanted to talk to him. Detective Hudson acknowledged that he was aware that Mr. Sanders had an attorney at that time. He testified: "I had no knowledge of any permission from the attorney to speak to Mr.Sanders other than that was what's necessary for the polygraph." [Walker Hearing, p 47]

It is not disputed that prior to the polygraph examination, Sgt. Myatt read Respondent his "Miranda rights" [1] and had Respondent sign a Michigan State Police form acknowledging that he had been advised of those rights. Nor is it disputed that Respondent had been advised of his "Miranda" rights by Det. Hudson, as well, at the time Hudson conducted his post-polygraph interrogation.

At the trial, the trial court admitted Respondent's

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1. Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

statements into evidence over Respondent's objections and his conviction thereafter followed. In reversing that conviction and granting a new trial, the Michigan Court of Appeals held:

> Plaintiff [the People] failed to show that defendant knowingly and intelligently waived his right to counsel's presence at his polygraph interview. US Const, Am VI; Const 1963 [Michigan Constitution], art 1, section 20. Plaintiff showed no more than defendant's affirmative responses to the questions of whether he understood his Miranda rights . . . and whether he relinquished those rights. People v Leonard, 421 Mich 207, 424 [sic] 364 NW2d 625 (1984). Evidence of the polygraph examination should not have been admitted at trial. Because we cannot conclude that the error was harmless, we reverse defendant's convictions and remand for a new trial.

People v Sanders, unpublished,
Michigan Court of Appeals docket # 145890,
Decided October 25, 1994.
Appendix A to Petition for Certiorari

On January 18, 1995, the Michigan Court of Appeals subsequently denied the People's motion for rehearing "for lack of merit in the grounds presented." (Appendix A hereto) Subsequently, on March 31, 1995, the Michigan Supreme Court denied the People's application for leave to appeal the Court of Appeal's decision, stating that the Supreme Court was "not persuaded that the question presented should be reviewed by this Court." (Appendix B hereto) On July 12, 1995, the Michigan Supreme Court denied the People's motion for reconsideration of its March 31, 1995 Order, stating that "it does not appear that the order was entered erroneously." (Appendix B to Petition for Certiorari).

Respondent has remained incarcerated throughout these various appellate proceedings. No new trial has yet occurred.

REASONS FOR DENYING THE WRIT

I.

THERE ARE NO COMPELLING REASONS TO GRANT CERTIORARI NOR IS AN IMPORTANT FEDERAL QUESTION PRESENTED IN THIS MATTER WHERE THE MICHIGAN COURT OF APPEALS, IN AN UNPUBLISHED OPINION HAVING NO PRECEDENTIAL VALUE, WHILE RELYING ON THE SIXTH AMENDMENT RIGHT TO COUNSEL, NEVERTHELESS BASED ITS DECISION UPON MICHIGAN COMMON LAW AND MICHIGAN CONSTITUTIONAL PROVISIONS IN GRANTING A NEW TRIAL.

Respondent urges that involvement of this Court in review of the Michigan Court of Appeals decision herein would be improvident and wasteful of this Court's important resources. Petitioner has failed to provide a convincing basis for concluding that there are compelling reasons for granting its Petition for a writ of certiorari. Further, Petitioner has failed to present a federal question for this Court's review. See S Ct Rule 10.

a. Granting Certiorari in this Matter Would Be an Improvident Waste of this Court's Resources since the Appealed Decision Is [i] Without Precedential Value and [ii] Does Not Constitute a Final Order Disposing of the Case.

The decision of the Michigan Court of Appeals appealed from in this matter on its face verifies that it was unpublished. See Appendix A, Petition for Certiorari. Michigan court rule, MCR 7.215, and supporting caselaw, makes clear that such an unpublished opinion is without precedential value or import and may not be cited nor relied upon as having any stare decisis stature. The opinion is a nonlegal happening except within the

context of the case in question. [1] Accordingly, for this Court to involve itself in the examination of the challenged opinion would be the worst and most futile of investments of its precious, much-needed attention to authentic issues.

Furthermore, the appealed from decision is hardly the end of this disputed matter. Only after the completion of the new trial ordered by the Court of Appeals' decision and the entry of a judgment by a jury at that trial can it be known whether the Court of Appeals opinion has caused the injury of which Petitioner complains needs address. At this point no damage has been inflicted upon the People except to require the prosecution of the new trial. Should Respondent be convicted at that new trial the claim raised by the People here would be moot. That being so, it is apparent that it would be, at best, an improvident employment of this Court's assets to engage in a determination as to whether there is merit to Petitioner's speculative appeal.

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1. MCR 7.215(C)(1) provides in pertinent part:

> (C) **Precedent of Opinions.**
> (1) An unpublished opinion is not precedentially binding under the rule of stare decisis.

The Michigan courts have consistently held that the unpublished opinions of the Michigan Court of Appeals have no precedential value under MCR 7.215(C). see Battiste v Department of Social Services, 154 Mich App 486; 398 NW2d 447 (1986); Priesman v Meridian Mutual Ins Co. 185 Mich App 123, 126; 460 NW2d 244 (1990); People v Polus, 197 Mich App 197, 203; 495 NW2d 402 (1992).

b. The Decision of the Michigan Court of Appeals Primarily Relied upon the Common Law of the State of Michigan Interpreting and Applying the Michigan Constitutional Guarantees and Such Decision, accordingly, Does Not Present a Federal Question for Review by this Court.

The issue presented in this matter, at base, is whether Respondent's positive responses to the Fifth Amendment Miranda warnings read to him by the police before and after the polygraph examination constitute an intentional and intelligent relinquishment of Respondent's constitutional rights to the presence and advise of his counsel at that crucial point in the process.

The factual context within which Respondent allegedly waived his rights to counsel are, of course, of paramount concern. At Respondent's express request, Counsel had been appointed at his arraignment. A preliminary examination had been conducted at which Respondent had been represented by such counsel. A polygraph had been requested by Respondent's counsel with the understanding that counsel would be advised of its time, place and would be able to attend the examination. Respondent's counsel testified he would never have consented to such an examination under other circumstances because he was aware that the police would employ the polygraph process to attempt to gain a confession from the Respondent in his absence. The polygraph was nevertheless arranged without Respondent's counsel's knowledge or consent and conducted outside of his presence. The police here knew Respondent was represented by counsel and knew that his counsel had not waived Respondent's right to have him present.

A reconstruction of Respondent's mind-set at the time must be envisioned. At his request the polygraph examination had

been requested by his own counsel. Respondent, himself, however, could not possess knowledge nor be aware of the fundamental importance of having his counsel present during the procedure. Further, the procedure itself, at least in the mind of a layman, could not go forward without a waiver of the rights set forth explicitly in the Miranda warnings.[1] Obviously and undeniably, in the circumstances, an unschooled accused person would acquiesce in conditions which no experienced criminal lawyer would ever agree to.

As appears from the argument presented in the following section of this Brief, Respondent submits that, under well established and accepted decisions of this Court, his right to counsel as guaranteed under the Sixth Amendment were unquestionably violated when the police, in such circumstances, proceeded to interrogate him and gain a confession from him. But the police actions further violated the constitutional principles of the State of Michigan which guaranteed him the protections of counsel. It is, in fact, those state constitutional guarantees and common law of the State of Michigan implementing them that were the foundation upon which the Court of Appeals in this matter relied in reaching the decision Petitioner seeks to overturn.

The Court of Appeals decision expressly refers to the Michigan constitutional provision, 1963 Const, art 1, section 20, which secured Respondent's right to have his counsel present at

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1. How could one answer the polygraph questions without relinquishing the right to remain silent?

the polygraph interview.[1] Furthermore, in concluding that, in merely "show[ing] no more than [Respondent's] affirmative responses to the questions of whether he understood his Miranda rights . . . and whether he relinquished those rights" the People had failed to show that Respondent had "knowingly and intelligently waived his right to counsel's presence at his polygraph interview" [2] the Court of Appeals relied upon Michigan precedent, not federal precedent, citing and following People v Leonard, 421 Mich 207, 364 NW2d 625 (1984)

This has controlling significance in the determination here as to whether a federal question is presented for determination by Petitioner's request for certiorari. For, in language which is unmistakably clear, Justice Williams in the Leonard decision stated that the issue presented was "[w]hether under the Michigan Constitution there was a valid waiver of defendant's right to the assistance of counsel for his defense." People v Leonard, supra, at p 210. Justice Williams continued at p 212:

> Thus, I hold that the prosecution did not meet its burden under the Michigan Constitution of proving that the defendant knowingly, intelligently, and intentionally relinquished his right to counsel for his defense. [Emphasis added].

Nor did Justice Williams leave the matter there. It is altogether clear from his opinion that he was defining "a basic

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1. Article 1, Section 20 of the Michigan Constitution of 1963 provides: "In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his defense. . . . "

2. Court of Appeals unpublished decision, pp 1, 2, Appendix A, Petition for Certiorari.

test for determining a valid waiver of an article 1, section 20 right to counsel," under the Michigan Constitution not the Sixth Amendment People v Leonard, supra, p 222, and that, in doing so, the test adopted might well contain "a higher standard" than those found applicable by federal precedent under the Sixth Amendment, citing again at p 222 of the Leonard decision, Lego v Twomey, 404 US 477, 489; 92 US 619; 30 L Ed 2d 618 (1972). Accordingly, the 6 step test set forth at p 224 of his opinion [1]-- and the page of the Leonard opinion which was obviously referred to in the instant Court of Appeals decision, is the standard for determination under the Michigan Constitution article 1, section 20 and not under the Sixth Amendment.

It follows that, in seeking review of the unpublished Michigan Court of Appeals decision herein, Petitioner would have this Court review a state constitutional issue and not a federal question as required by Rule 10. Respondent respectfully urges that a grant of the writ in such circumstances would be inappropriate.

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1. This is manifestly the page of the Leonard decision The Court of Appeals decision intended to refer to in citing the Leonard opinion.

II.

THE PETITION FOR CERTIORARI SHOULD BE DENIED WHERE THE MICHIGAN COURT OF APPEALS GRANTED A NEW TRIAL HAVING DETERMINED THAT, AFTER THE ACCUSED HAD BEEN ARRAIGNED, HIS COUNSEL HAD BEEN APPOINTED AND A PRELIMINARY EXAMINATION HAD BEEN CONDUCTED, THE POLICE INITIATED INTERROGATION OF THE ACCUSED OUTSIDE THE PRESENCE OF ACCUSED'S COUNSEL AND OBTAINED A CONFESSION FROM HIM IN VIOLATION OF MICHIGAN COMMON LAW AND CONSTITUTIONAL PROVISIONS AS WELL AS IN VIOLATION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL PROTECTIONS.

Respondent submits that an objective reading of the Petition filed in this matter leaves no basis for granting the writ.

Respondent refrains from rejoining Petitioner's critical evaluation of the Respondent's arguments purportedly asserted in the Michigan appellate courts -- a subject which occupies the majority of Petitioner's argument. Suffice it to observe that [i] the Michigan Court of Appeals entered its opinion rejecting Petitioner's position (Appendix A, Petition for Certiorari); [ii] the Michigan Court of Appeals rejected a rehearing "for lack of merit" (Appendix A hereto); [iii] the Michigan Supreme Court denied leave to appeal "because we are not persuaded that the question presented should be reviewed by this Court" (Appendix B hereto); and [iv] the Michigan Supreme Court rejected Petitioner's efforts to overturn the Court's order denying leave to appeal "because it does not appear that the order [denying leave] was entered erroneously." (Appendix B, Petition

for Certiorari).[1]

What is undeniable here is that both police officers have admitted that they initiated the interrogation of an accused who was in custody while knowing full well that the accused was represented by counsel, that counsel was not present and that they had no knowledge of any waiver by Respondent's counsel to an interrogation of the client absent counsel's presence. Given that factual predicate, the question which must be answered is whether the Sixth Amendment right to counsel can be circumvented by skilled, experienced police interrogators simply by reciting the Miranda warnings and gaining the accused's waiver of those rights as a condition of the polygraph process and all that follows.

In such circumstances, this Court has stated very clear guidelines as to the consequences:

> We hold that, if the police initiated interrogation after a defendant's assertion at the arraignment or similar proceeding, of his right to counsel, any waiver of defendant's counsel for that police-initiated interrogation is invalid.

Michigan v Jackson, 475 US 625, 636; 106 S Ct 1404; 89 L Ed 2d 631 (1986).

The Opinion continued at 633, stating that the Court "should indulge in every reasonable presumption in favor of protecting the constitutional claim."

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1. Notwithstanding Petitioner's arguments to the contrary, the Michigan Court of Appeals relied upon Justice Williams' concurring opinion in the Leonard decision. The Michigan Court of Appeals and the Michigan Supreme Court, in rejecting Petitioner's repeated efforts for reconsideration, have made that indisputable.

The Michigan Supreme Court decision of People v Leonard, supra, relied upon by the Michigan Court of Appeals in deciding this matter, affirmed that under Michigan constitutional guarantees the strongest presumption against waiver of the right to counsel, "[e]specially after the defendant has been arraigned" Leonard, supra, at 217-218. The Leonard decision and the Michigan Court of Appeals in deciding this case under decided Michigan precedent and Michigan Constitution art 1, section 20, explicitly and expressly, rejected the very position asserted by the Petitioner here. The mere recital of a Miranda warning without more will not suffice to show an intelligent and intentional waiver of counsel in a post-arraignment police interrogation of an accused conducted in the absence of the accused's attorney.

As this Court stated in Johnson v Zerbst, 304 US 458, 462-463; 58 S Ct 1019; 82 L Ed 1461 (1938):

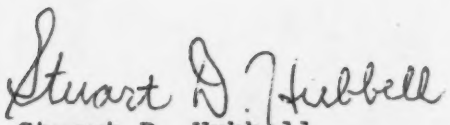
> The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done." It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself . . .

This Court can be assured of a certainty that the Michigan Court of Appeals and the Michigan Supreme Court did not lightly reach their conclusions in this matter. Nor did those Courts waver in their respective conclusions that the Court of Appeals decision was mandated by the manifest and fundamental necessity of protecting all accused from a deprivation of their right to independent counsel.

CONCLUSION

WHEREFORE, Respondent respectfully submits that the prayed for writ of certiorari should be denied as improvident, there being no showing of compelling reasons to issue the writ nor is an important federal question presented by the Petition.

Respectfully submitted,



Stuart D. Hubbell
400 East Eighth Street
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Phone: (616) 947-5600

APPENDIX

APPEL..X A: COPY OF COURT OF APP..LS ORDER

ORDER

People v Rico Arnez Sanders

Docket # 145890

L.C. # 91000879 FC

Donald E. Holbrook, Jr.

Presiding Judge

Gary R. McDonald
Robert L. Evans

Judges

The Court orders the motion for rehearing DENIED for lack of merit in the grounds presented.

A true copy entered and certified by Ella Williams, Chief Clerk, on

January 18, 1995

/s/ Ella Williams
Chief Clerk

APPENDIX B: ORDER OF MICHIGAN SUPREME COURT

ORDER

Entered: March 31, 1995

102124

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SC: 102124
COA: 145890
RICO ARNEZ SANDERS LC: 91-000879-FC

Defendant-Appellee

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

80328

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court

March 31, 1995

/s/Jacqueline B. MacKinnon
Deputy Clerk

No. 95-633

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

- v -

RICO ARNEZ SANDERS,
Respondent.

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF GRAND TRAVERSE)

DENISE MELICHAR, being first duly sworn, deposes and says that on the 7th day of November, 1995, she filed with this Court the following:

MOTION TO LEAVE TO PROCEED IN FORMA PAUPERIS
AFFIDAVIT
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
PROOF OF SERVICE

and mailed one (1) copy of same to:

Peter R. George
Prosecutor
301 County Building
Port Huron, MI 48060

Denise Melichar
Denise Melichar

Subscribed and sworn to before me
this 7th day of November, 1995

Dolores Kratochvil
Dolores Kratochvil, Notary Public
Grand Traverse County, Michigan
My Commission Expires: 5-26-96